

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JOHN E BETTYS,

Plaintiff,

v.

BERNARD WARNER et al.,

Defendants

CASE NO. C12-5619 RBL-JRC

REPORT AND RECOMMENDATION

NOTED FOR:

AUGUST 17, 2012

The District Court has referred this 42 U.S.C. § 1983 civil rights action to United States Magistrate Judge, J. Richard Creatura. The authority for the referral is 28 U.S.C. § 636 (b) (1) (A) and (B), and local Magistrate Judge Rules MJR3 and MJR4.

The Court recommends that this action be dismissed prior to service for two reasons: (1) plaintiff has failed to exhaust Washington State's prison grievance system prior to filing the action as required by the Prison Litigation Reform Act; (2) plaintiff is asking the Court to overturn a conviction in a civil rights action and he must seek this relief through habeas corpus. Plaintiff may be able to cure this second defect by amendment of the complaint, but he cannot

1 cure the first defect. Therefore, the Court recommends dismissal without prejudice prior to  
2 service of process.

### 3 DISCUSSION

#### 4 1. Exhaustion of state remedies.

5 The Prison Litigation Reform Act (“PLRA”) requires plaintiff to exhaust whatever  
6 administrative remedies are available to him prior to filing a complaint in federal court. The  
7 relevant portion of the Act states:

8 No action shall be brought with respect to prison conditions under section 1983 of  
9 this title, or any other Federal law, by a prisoner confined in any jail, prison, or other  
10 correctional facility until such administrative remedies as are available are  
11 exhausted.

12 42 U.S.C. § 1997e (a).

13 The statute defines “prisoner” to include any person confined in a facility for a violation  
14 of criminal laws, including persons accused of or convicted of crimes. Here, plaintiff filed this  
15 action while incarcerated and the act applies to him. See 42 U.S.C. §1997e (h).

16 Having determined that the Act applies to plaintiff, it is clear he did not exhaust his  
17 available remedies and he makes that admission in the complaint (ECF No. 1, proposed  
18 complaint, page 2, section II C.) The action should be dismissed without prejudice so plaintiff  
19 may exhaust his claims. Until the claims are exhausted they may not be maintained in federal  
20 court. The Court recommends dismissal without prejudice.

#### 21 2. Exhaustion of habeas corpus remedies.

22 In addition to the defect noted above, plaintiff is asking the Court to overturn a criminal  
23 conviction in this civil rights action (ECF No. 1, page 10, relief sought). If a plaintiff is  
24 challenging the very fact or duration of physical imprisonment, and the relief sought will  
determine whether plaintiff is or was entitled to immediate release or a speedier release from that

1 imprisonment, plaintiff's sole federal remedy is a writ of habeas corpus. Preiser v. Rodriguez,  
 2 411 U.S. 475, 500 (1973).

3 The United States Supreme Court held that "[e]ven a prisoner who has fully exhausted  
 4 available state remedies has no cause of action under § 1983 unless and until the conviction or  
 5 sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas  
 6 corpus." Heck v. Humphrey, 512 U.S. 477, 487 (1994). The Court added:

7 Under our analysis the statute of limitations poses no difficulty while the state  
 8 challenges are being pursued, since the § 1983 claim has not yet arisen. . . . [A]  
 § 1983 cause of action for damages attributable to an unconstitutional conviction  
 or sentence does not accrue until the conviction or sentence has been invalidated.

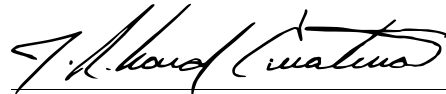
9 Id. at 489. "[T]he determination whether a challenge is properly brought under § 1983 must be  
 10 made based upon whether 'the nature of the challenge to the procedures [is] such as necessarily  
 11 to imply the invalidity of the judgment.' Id. If the court concludes that the challenge would  
 12 necessarily imply the invalidity of the judgment or continuing confinement, then the challenge  
 13 must be brought as a petition for a writ of habeas corpus, not under § 1983." Butterfield v. Bail,  
 14 120 F.3d 1023, 1024 (9th Cir. 1997) (*quoting* Edwards v. Balisok, 520 U.S. 641 (1997)). Here,  
 15 plaintiff asks the Court to overturn a conviction. This relief plaintiff seeks brings the action under  
 16 the purview of habeas corpus with its attendant exhaustion requirement. The Court recommends  
 17 that this action be dismissed without prejudice.

18 The Court recommends that in forma pauperis status be revoked for purpose of appeal.

19 Pursuant to 28 U.S.C. § 636 (b) (1) and Fed. R. Civ. P. 72(b), the parties shall have  
 20 fourteen (14) days from service of this Report to file written objections. See also Fed. R. Civ. P.  
 21 6. Failure to file objections will result in a waiver of those objections for purposes of de novo  
 22 review by the district judge. See 28 U.S.C. § 636 (b) (1) (C). Accommodating the time limit  
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1 imposed by Fed. R. Civ. P. 72 (b), the clerk is directed to set the matter for consideration on  
2 August 17, 2012, as noted in the caption.

3 Dated this 13th day of July, 2012.

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5 J. Richard Creatura  
6 United States Magistrate Judge  
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